BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JORGE MARQUEZ Claimant VS. **COLLECTIA, LTD.** Respondent AND **ACE AMERICAN INSURANCE CO.** Insurance Carrier	)	Docket No. 1,056,635

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 8, 2012, preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Pamela J. Fuller. Thomas R. Fields, of Kansas City, Kansas, and C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to provide the additional evidence necessary to change the Board's Order dated October 28, 2011, in which a Board Member had found claimant failed to prove he suffered personal injury by accident arising out of and in the course of his employment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 4, 2012, Preliminary Hearing and the exhibits and the transcript of the August 12, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that he failed to provide the additional evidence necessary to change the Board Order dated October 28, 2011, which found he failed to prove he suffered personal injury by accident arising out of and in the course of

his employment. Claimant argues the evidence shows he sustained a series of repetitive traumas that arose out of and in the course of his employment with respondent.

Respondent argues that based on all the credible evidence offered at the preliminary hearings, claimant failed to prove he sustained either a personal injury by accident or a repetitive trauma injury that arose out of and in the course of his employment.

The issue for the Board's review is: Did claimant sustain personal injury by accident or repetitive trauma injury that arose out of and in the course of his employment?

FINDINGS OF FACT

This case was first heard by the ALJ in a preliminary hearing held August 12, 2011. Claimant testified at that time that he suffered injury by an accident that occurred on May 17, 2011, when he was pushing metal trash bins onto a lift by hand. Claimant said the act of pushing the bins caused him to suffer pain in his lower back. Claimant first sought medical treatment with Dr. Jerome Greene, a chiropractor. Later he sought treatment at Bob Wilson Memorial Hospital, where he was seen by Dr. Douglas Johnson. He was eventually referred to the Kansas Spine Hospital in Wichita and had back surgery performed by Dr. Matthew Henry on or about June 13, 2011.[1] None of those medical records indicated that claimant had given a history of a work-related accident, although claimant testified he accurately and completely described his complaints and cause of his complaints to the treating medical providers.

At the August 12, 2011, preliminary hearing, the ALJ stated: "[B]ased on the medical that's before me today and the testimony, I am going to order temporary, total disability from June 6th, 2011, and continuing."[2] On August 15, 2011, the ALJ ordered respondent to pay claimant temporary total disability benefits and to provide claimant with medical treatment. Respondent appealed the ALJ's August 15, 2011, Order for Compensation to the Board. In an Order dated October 28, 2011, Board Member Korte, after reviewing the testimony and medical records attached as exhibits to the August 12, 2011, hearing stated:

> Claimant alleges an accidental injury which arose out of and in the course of his employment with respondent on May 17, 2011. However, claimant failed to advise respondent of this alleged accident until June 14, 2011, when claimant was in the hospital awaiting surgery on his low back. . . . Here, claimant sought medical treatment with several health care providers and failed for several weeks to provide a history of a work-related accident. While claimant testifies that he gave an

[1] There is apparently some question as to whether claimant's surgery was performed on June 13, 14 or 15, 2011. The hospital records indicate the surgery was performed on June 13, 2011.

[2] P.H. Trans. (Aug. 12, 2011) at 27.

> accurate history to every health care provider, he cannot explain how every health care provider managed to omit the history of the accident while claimant was working with the dumpsters. This Board Member finds that claimant has failed to prove that he suffered personal injury by accident while working for respondent.[3]

The ALJ's order of August 15, 2011, was reversed.

Claimant filed another Application for Preliminary Hearing on April 12, 2012, requesting additional medical treatment. A preliminary hearing was held May 4, 2012. At the May 2012 hearing, claimant's attorney orally moved to amend claimant's Application for Hearing to allege a series of accidents beginning on or about May 17, 2011, and each and every day thereafter until claimant was taken off work.[4] Respondent made no objection to that request.

At the May 4, 2012, preliminary hearing, claimant testified that he had been injured at work on May 17, 2011, while working with a dumpster and a Tommy Lift. Claimant testified he continued to work for a week or two after that incident, and his low back worsened during the period he continued to work. Claimant related his worsening to the sudden moves he made when lifting dumpsters without adequate equipment because the Tommy Lift was out of order.[5] Claimant said he did not report his injury initially because he thought the pain would go away. Eventually, as reflected in the medical records made a part of the transcript of the August 12, 2011, preliminary hearing, claimant received treatment and surgery on his low back. Claimant reiterated at the May 2012 hearing that he was honest and truthful with his medical providers and gave them a complete history of his complaints. Claimant further testified that he had never had any problems with his back before the May 17, 2011, incident at work.

Claimant was seen by Dr. Pedro Murati on February 12, 2012, at the request of claimant's attorney. After taking a history, reviewing medical records, and performing a physical examination of claimant, Dr. Murati opined:

> The claimant sustained an injury at work which resulted in back and leg pain. The claimant is a young person. He is a nonsmoker. His hobbies are not known as a direct cause of any of his diagnoses. He has no significant pre-existing injuries that would be related to his medical conditions. He has significant clinical findings that have given him diagnoses consistent with his described injury at work.

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[3] *Marquez v. Collectia Ltd.*, Docket No. 1,056,635, 2011 WL 5341328 (Kan. WCAB Oct. 28, 2011).

[4] Claimant filed a written Form K-WC E-1, Amended Application for Hearing, with the Division on May 8, 2012.

[5] P.H. Trans. (May 4, 2012) at 6.

Therefore it is under all reasonable medical certainty; the prevailing factor in the development of his conditions is his accident at work.[6]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

(e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . . .

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

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[6] P.H. Trans. (May 4, 2012), Cl. Ex. 1 at 3.

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. . . .

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

It is apparent that English is not claimant's primary language because he testified through an interpreter at both the August 12, 2011, and the May 4, 2012, preliminary hearings. It is not known whether claimant had an interpreter at his appointments with the physicians. Neither is it known to what extent claimant is able to communicate in English. Judge Fuller personally observed claimant testify at both preliminary hearings. There were no other witnesses that testified at either of those hearings or by deposition. Judge Fuller apparently found claimant's testimony to be credible because she awarded compensation after the first preliminary hearing. The Board generally affords some deference to an ALJ's finding as to credibility, although it is not stated whether Board Member Korte did so in this case. Nevertheless, after her first preliminary hearing order was reversed, Judge Fuller apparently changed her opinion on whether the evidence was sufficient or viewed that evidence in a different light after the second preliminary hearing, despite there being no new evidence offered by respondent to refute claimant's testimony. Also, at the May 4, 2012, hearing, claimant amended his claim from an allegation of an injury from a single accident to an allegation of injury by repetitive trauma. Claimant also presented some additional testimony together with the independent medical evaluation report of Dr. Pedro Murati dated February 21, 2012.

Claimant attributes his back injury to his job duties with respondent. Claimant's job is certainly one that is capable of producing such an injury because it requires heavy lifting, particularly when the Tommy Lift is inoperable or malfunctioning, as claimant said. There is no contrary testimony. Respondent's rebuttal evidence against claimant's claim is the absence of a reported history of a work injury in any of the contemporaneous medical treatment records. In addition, respondent points to the chiropractor's June 3, 2011, note that indicates claimant had experienced an episode of back pain three years earlier and the June 10, 2011, note that indicated claimant's back pain had worsened after he sneezed at home that morning. Also, the June 10, 2011, hospital records indicate a worsening after the last chiropractic manipulations. While those records fail to support claimant's allegations of a work-related injury, they fail to overcome claimant's testimony concerning

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2011 Supp. 44-555c(k).

the initial and prevailing mechanism of injury being claimant's lifting activities at work during the period alleged.

CONCLUSION

Claimant's back was injured by repetitive trauma arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order Denying Medical Treatment of Administrative Law Judge Pamela J. Fuller dated May 8, 2012, is reversed, and this matter is remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge